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Supreme Court, U.S.
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IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BEST,

Petitioner,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for Writ of Certiorari to the United States Court Of Appeals for the Second Circuit

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PETITION FOR WRIT OF CERTIORARI

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QUESTION PRESENTED

Petitioner James Best was convicted of aiding and abetting a Medicare fraud perpetrated by Jerome Maciejewski. The only evidence linking Best with Maciejewski's scheme was hearsay testimony that Maciejewski stated he would "call Albany and talk to Jim and take care of" something. This testimony was admitted over objection against Best to prove that Best's writing of a cost allocation memo was carried out pursuant to Maciejewski's scheme. It was admitted under the state-of-mind exception to the hearsay rule, *see* Fed.R.Evid. 803(3), even though Best was not the declarant. The Second Circuit affirmed the conviction and held that hearsay testimony regarding a declarant's intent may be admitted to prove the subsequent conduct of a third party, so long as there is independent evidence connecting the declarant's statement with the third party's actions. In the present case, such "independent evidence" consisted of the similarity of Best's memo to a memo written by Maciejewski.

The question presented is:

Did the Second Circuit err in holding–in agreement with the Ninth Circuit but in conflict with rulings of the First and Fourth Circuits–that state-of-mind hearsay testimony regarding the declarant's intended actions may be admitted against a third party to prove the third party's subsequent conduct?

PARTIES TO THE PROCEEDINGS BELOW

The parties to the proceeding below were:

Appellant (Petitioner herein): James Best.[1]

Appellee (Respondent herein): United States of America

[1] The case below was originally captioned: ***UNITED STATES OF AMERICA, Appellee v. JEROME MACIEJEWSKI, also known as Jerome Maciejewski, and JAMES BEST, Defendants-Appellants.*** However, Maciejewski withdrew his appeal prior to the filing of briefs on the merits.

TABLE OF CONTENTS

QUESTION PRESENTED ii

PARTIES TO THE PROCEEDINGS BELOW iii

TABLE OF CONTENTS iv

TABLE OF AUTHORITIES vi

OPINIONS BELOW 1

JURISDICTION 2

STATUTORY PROVISIONS 2

STATEMENT OF THE CASE 2

REASONS FOR GRANTING THE PETITION 5

I. THIS IS AN IMPORTANT ISSUE OF LAW THAT NEEDS TO BE RESOLVED BY THE SUPREME COURT 6

A. Hearsay Evidence Concerning the Declarant's Intent is Inherently Unreliable When Used to Prove Subsequent Conduct of a Third Party 6

B. Setting the Boundaries of Rule 803(3)'s Exception to the Hearsay Rule is Necessary to Eliminate the Conflict that Presently Exists Among Lower Courts on this Issue 8

C. The Second Circuit's Holding that Rule 803(3) Renders Statements of Intent by a Declarant Admissible to Prove Subsequent Actions of a Third Party is Contrary to the Intent of Congress 10

D. The Second Circuit's Holding that Rule 803(3) Renders Statements of Intent by a Declarant Admissible to Prove Subsequent Actions of a Third Party is Theoretically Untenable 13

II. THIS CASE PRESENTS AN IDEAL VEHICLE TO SET THE BOUNDARIES OF RULE 803(3)'S EXCEPTION TO THE HEARSAY RULE, AS THERE WAS SOME CORROBORATING EVIDENCE, BUT IT WAS OF SLIGHT PROBATIVE VALUE..... 16

CONCLUSION 19

TABLE OF AUTHORITIES

CASES:

Brown v. Tard,
552 F.Supp. 1341 (D.N.J. 1982) 12-13

Gual Morales v. Hernandez Vega,
579 F.2d 677 (1st Cir. 1978) 8, 9

Hunter v. State,
40 N.J.Law 495 12

Johnson v. Chrans,
844 F.2d 482 (7th Cir. 1988) 6, 10

Mutual Life Insurance Company v. Hillmon,
145 U.S. 706 (1892) ..... 4, *passim*

People v. Alcalde,
148 P.2d 627 (1944) 6

People v. Purvis,
362 P.2d 713 (1961) 14

Shepard v. United States,
290 U.S. 96 (1933) 7, 14

United States v. Astorga-Torres,
682 F.2d 1331 (9th Cir. 1982) 9

United States v. Badalamenti,
794 F.2d 821 (2d Cir. 1986) 4

United States v. Brown,
160 U.S. App. D.C. 190, 490 F.2d 758 (1974).. 14, 15

United States v. Cicale,
691 F.2d 95 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983) 4

United States v. Delvecchio,
816 F.2d 859 (2d Cir. 1987) 4, 9

United States v. Houlihan,
871 F.Supp. 1495 (D. Mass. 1994) 8, 10

United States v. Jenkins,
579 F.2d 840 (4th Cir. 1978) 8, 9

United States v. Nersesian,
824 F.2d 1294 (2d Cir.), cert. denied, 484 U.S. 957 (1987) 4, 9

United States v. Pheaster,
544 F.2d 353 (9th Cir. 1976), cert. denied sub nom. *Inciso v. United States*, 429 U.S. 1099 (1977) 9-10, 14-16

United States v. Sperling,
726 F.2d 69 (2d Cir.), cert. denied, 467 U.S. 1243 (1984) 4

United States v. York,
1987 WL 5953 (N.D.Ill. 1987) 9

STATUTES AND RULES:

18 U.S.C. § 2 2

18 U.S.C. § 1031 2

18 U.S.C. § 3231 2

28 U.S.C. § 1254(1) 2

Federal Rule of Evidence 802 ..... 2, 5

Federal Rule of Evidence 803 5

Federal Rule of Evidence 803(3) ..... ii, *passim*

LEGISLATIVE HISTORY:

Fed.R.Evid. 803(3) House Judiciary Committee Report, H. R. Rep. No. 650, 93d Cong., 1st Sess. 13-14 (1973), U.S.Code Cong. & Admin. News 1974, p.7051 ... 8-10

Fed.R.Evid. 803(3) Advisory Committee's Note, reprinted in Eric D. Green & Charles R. Nesson, FEDERAL RULES OF EVIDENCE 166 (1992) 8-11

OTHER AUTHORITIES:

4 J. Weinstein & M. Berger, WEINSTEIN'S EVIDENCE, par 803(3) 6-7

Maguire, *The Hillmon Case—Thirty-three Years After*, 38 Harv.L.Rev. 709 (1925) 6

Payne, *The* Hillmon *Case Revisited*,
41 Va. L. Rev. 1011 (1955) 14

Seligman, *An Exception to the Hearsay Rule*,
26 Harv. L. Rev. 146 (1912) 14

IN THE
SUPREME COURT OF THE UNITED STATES

JAMES BEST,

Petitioner,

v.

UNITED STATES OF AMERICA,

Respondent.

Petition for Writ of Certiorari to the
United States Court Of Appeals
For The Second Circuit

Petitioner James Best prays that this Court issue a Writ of Certiorari to the United States Court of Appeals for the Second Circuit to review the opinion of that court in *United States of America v. James Best.*

OPINIONS BELOW

The opinion of the Second Circuit is reported at 219 F.3d 192 (2d Cir. 2000) and appears in the Appendix at 1a. The opinion of the U.S. District Court for the Northern District of New York is reported at 170 F. Supp.2d 129 (N.D.N.Y. 1999) and appears in the Appendix at 18a. The Second Circuit's order of September 19, 2000 denying the petition for a panel rehearing is unreported and appears in the Appendix at 35a.

JURISDICTION

The Second Circuit denied Appellant-Petitioner's petition for panel rehearing on September 19, 2000. App. 35a. The Second Circuit issued its decision on July 25, 2000. App. 1a. This Court has jurisdiction to issue a Writ of Certiorari to the Second Circuit pursuant to 28 U.S.C. § 1254(1).

STATUTORY PROVISIONS

The Major Fraud Act, 18 U.S.C. § 1031, is found in the Appendix at 37a. The Aider and Abettor Act, 18 U.S.C. § 2, is found in the Appendix at 41a. The Hearsay Rule, Federal Rule of Evidence 802, is found in the Appendix at 42a. The "State of Mind" Exception to the Hearsay Rule, Federal Rule of Evidence 803(3), is found in the Appendix at 43a.

STATEMENT OF THE CASE

Petitioner James Best ("Best") was indicted on one count of aiding and abetting a Medicare fraud perpetrated by codefendant Jerome Maciejewski ("Macie"). The district court's jurisdiction was based upon 18 U.S.C. § 3231.

Macie was the Executive Vice President of Blue Shield of Western New York. He was responsible for the oversight of all three divisions of the corporation, one of which was the Albany division. Best was the Chief Operating Officer of the Albany division. The fraud involved the submission of false claims for Medicare reimbursement for company expenses that were ineligible for such compensation.

The case against Macie was substantial and detailed,

showing his planning of the scheme and creation and submission of a series of false documents in furtherance thereof, including fraudulent memos seeking Medicare cost allocation. Best allegedly aided Macie's fraud by submitting a single cost-allocation memo from his division to company accounting.

Unlike the powerful evidence against Macie, the case against Best was thin. The prosecution relied primarily upon only two facts: (1) hearsay testimony that Macie told a colleague he would contact "Jim in Albany" to "take care of" something for him in connection with his scheme, and (2) Best's memo was similar to one drafted and submitted by Macie. From this, the government argued that Macie must have contacted Best, recruited him into the criminal venture, and dictated the contents of his memo. The trial court relied upon those compounded inferences to admit the critical hearsay statement against Best under the "state of mind" exception to the rule against hearsay. The prosecution used that statement as proof of Best's subsequent conduct, specifically, his alleged later discussion with Macie and knowing participation in the fraud.

The district court based its ruling upon Second Circuit precedent regarding admission of state-of-mind hearsay testimony to prove subsequent conduct of third parties. Under the Second Circuit's interpretation of the state-of-mind exception to the hearsay rule, out-of-court declarations of intent may be admitted to prove the subsequent conduct of a third party, as long as there is some independent evidence connecting the statement of intent with the third party's conduct.

Presently, the government offered no proof that Macie actually contacted Best as suggested in the hearsay statement, whether by phone records, testimony, or any other means. Best

denied ever receiving such a call or contact. The only "independent evidence" connecting Macie's statement of intent with Best's actions was the similarity of Best's and Macie's cost-allocation memos.

The District Court allowed the government to introduce the hearsay statement as evidence of Best's future conduct, namely that Best met with Macie (presumably by phone), and that during that meeting, Best heard about the fraud and formed a criminal intent. App. 34a.

As a result of the admission of the hearsay statement, Best was convicted of one count of aiding and abetting a Medicare fraud perpetrated by the codefendant, Macie. Best moved for a judgment of acquittal or, in the alternative, for a new trial. The District Court denied the motion on July 25, 2000. See *United States v. Best,* 70 F. Supp.2d 129 (N.D.N.Y. 1999). App. 18a. Best timely appealed to the Second Circuit.

The Second Circuit affirmed the conviction, based upon its expansive interpretation of this Court's ruling in *Mutual Life Insurance Company v. Hillmon*, 145 U.S. 706 (1892). Specifically, the Second Circuit held that a declarant's out-of-court statement of intent is admissible in evidence against a person other than the declarant if there is independent evidence that connects the declarant's statement with the non-declarant's activities. *See United States v. Best*, 219 F.3d 192, 198-199, App. 9a (2d Cir. 2000) (citing *United States v. Delvecchio*, 816 F.2d 859, 863 (2d Cir. 1987); *United States v. Nersesian*, 824 F.2d 1294, 1325 (2d Cir.), cert. denied, 484 U.S. 957 (1987); *United States v. Badalamenti*, 794 F.2d 821, 825-26 (2d Cir. 1986); *United States v. Sperling*, 726 F.2d 69, 73-74 (2d Cir.), cert. denied, 467 U.S. 1243 (1984); *United States v. Cicale*, 691 F.2d 95, 103 (2d Cir. 1982), cert. denied, 460 U.S. 1082 (1983)). The Second Circuit relied upon the similarity of Best's

and Macie's memos as the "independent evidence" needed to admit the hearsay statement against Best.

Best filed a timely petition for rehearing. The Second Circuit denied the petition on September 19, 2000. App. 35a.

REASONS FOR GRANTING THE PETITION

This Court should grant review in this case and reverse the Second Circuit's aberrant interpretation of Federal Rule of Evidence 803(3),[2] the so-called "state of mind" exception to the hearsay rule. The Second Circuit's interpretation allows admission of hearsay evidence concerning the intent of the declarant to prove the subsequent conduct of a third-party non-declarant, whenever there is *any* evidence—even weak and wholly speculative evidence—connecting the statement with such later conduct. Even if this Court determines that there is no *per-se* prohibition of such hearsay evidence, the instant case presents the Court with an unusual opportunity to set meaningful federal standards concerning the conditions under which such hearsay evidence may be admitted.

The Second Circuit's ruling means that a declarant's statement of intent can be used to prove subsequent actions of a third party even when the corroborating evidence is of such small probative value (as to those actions) as to be almost meaningless. That ruling conflicts with rulings of the the First and Fourth Circuits, and conflicts with the House Judiciary Committee's stated intent that the 803(3) exception be limited

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[2] Hearsay testimony is generally inadmissible in a federal trial. Fed.R.Evid. 802 (the "hearsay rule"). App. 42a. Rule 803 enumerates several exceptions to the hearsay rule, including the state-of-mind exception. *See* Rule 803(3). App. 43a.

to proving subsequent actions of the *declarant only*. This Court should grant review and reverse the Second Circuit's conflicting ruling and set a uniform national standard on this important issue affecting a defendant's right to receive a fair trial.

I.

THIS IS AN IMPORTANT ISSUE OF LAW THAT NEEDS TO BE RESOLVED BY THE SUPREME COURT

A. Hearsay Evidence Concerning the Declarant's Intent is Inherently Unreliable When Used to Prove Subsequent Conduct of a Third Party

Many judges and commentators have generally—and understandably—expressed misgivings about using state-of-mind hearsay evidence to prove the subsequent conduct of a third-party non-declarant. *See, e.g., Johnson v. Chrans*, 844 F.2d at 485-86 (noting a "clear distinction between the reliability of out-of-court statements as proof of a declarant's state of mind and the reliability of such statements as proof of subsequent conduct by someone other than the declarant" and noting that Illinois law reflects a judgment that the unreliability of hearsay evidence is acceptable only where the *declarant's* state of mind is directly relevant); *People v. Alcalde*, 24 Cal.2d 177, 189, 148 P.2d 627, 633 (1944)(Traynor, J., dissenting)("A declaration as to what one person intended to do, however, cannot safely be accepted as evidence of what another probably did"); Maguire, *The* Hillmon *Case—Thirty-three Years After*, 38 Harv.L.Rev. 709, 717 (1925)("It is not customary to accept one man's extrajudicial assertions as evidence of another's mental state"); 4 J. Weinstein & M. Berger, WEINSTEIN'S

EVIDENCE, par 803(3), pp. 803-119 (noting that "the judiciary has been extremely circumspect about relying on [the federal state-of-mind exception] when the action of a person other than the declarant is involved"). *Cf. Shepard v. United States*, 290 U.S. 96, 105-06, 54 S. Ct. 22, 26 (1933)(Cardozo, J.) ("Declarations of intention, casting light upon the future, have been sharply distinguished from declarations of memory, pointing backwards to the past. There would be an end, or nearly that, to the rule against hearsay if the distinction were ignored").

The reason for such criticism is straightforward: out-of-court statements of intent are inherently unreliable to prove subsequent conduct of a third-party non-declarant, as the non-declarant's intent and that of the declarant are distinct and may be totally unrelated. Ordinarily this would not present a problem, as courts would naturally tend to exclude such use of extra-judicial statements of intent. The problem arises, however, where the declared intent involves interacting with the defendant. Then, there is a temptation to admit the evidence to show that the defendant participated with the declarant in the latter's schemes. Jurors, who are uninitiated in the dangers inherent in hearsay evidence in the first instnace—hence the need for the hearsay rule—are especially poorly equipped to discount the value of such evidence when used against a non-declarant. Nevertheless, as the below sections of this Petition demonstrate, some courts have yielded to the temptation to admit such evidence, with the result that many defendants in those jurisdictions are denied a fair trial. It is therefore vitally important that this Court set uniform and fair standards governing the conditions under which state-of-mind hearsay evidence may properly be admitted to prove the subsequent conduct of a third-party non-declarant.

B. Setting the Boundaries of Rule 803(3)'s Exception to the Hearsay Rule is Necessary to Eliminate the Conflict that Presently Exists Among Lower Courts on this Issue

The House Judiciary Committee Report on Rule 803(3) states that the "Committee intends that the Rule be construed to limit the doctrine of *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285, 295-300 (1892), so as to render statements of intent by a declarant admissible only to prove his future conduct, not the future conduct of another person." H.R.Rep. No. 650, 93d Cong., 1st Sess. 13-14 (1973), U.S. Code Cong. & Admin. News 1974, p.7051. The Fourth Circuit has recognized that this limitation inheres in Rule 803(3). *See United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978). The First Circuit also appears to have recognized the limitation. *See Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978).

The Advisory Committee's Note to Rule 803(3) states that "the rule of *Mutual Life Insurance Co. v. Hillmon*, allowing evidence of intention as tending to prove the doing of the act intended, is, of course, left undisturbed." *See* Fed.R.Evid. 803(3) Advisory Committee's Note, reprinted in Eric D. Green & Charles R. Nesson, FEDERAL RULES OF EVIDENCE 166 (1992). Accordingly, it appears, at least superficially, that the congressional intent is unclear, as the Judiciary Committee purported to "limit" the *Hillmon* doctrine while the Advisory Committee wanted to leave it undisturbed.

This apparent conflict in the legislative history has caused some courts to disregard the legislative history altogether, *see, e.g., United States v. Houlihan*, 871 F.Supp. 1495, 1498-99 (D. Mass. 1994)(specifically disregarding the

legislative history because of the conflict of the two reports); *United States v. York*, 1987 WL 5953, at *7 (N.D.Ill. 1987) ("[B]ecause of the conflicting statements of legislative intent, it is unclear whether Rule 803(3)" allows the hearsay statement of a declarant to prove the future conduct of a third party), while other courts cite only that portion of the history which supports the holding they wish to reach, *e.g.*, *United States v. Jenkins*, 579 F.2d 840, 843 (4th Cir. 1978)(citing only the House Judiciary Committee Report to conclude that Congress directed that Rule 803(3) be construed so that statements of intent would not be admissible to prove the future conduct of a non-declarant); *United States v. Best*, 219 F.3d 192, 198, App. 9a (2d Cir. 2000)(citing only the Advisory Committee Note to conclude that Congress intended that Rule 803(3) leave the *Hillmon* doctrine intact).

Because of this confusion and selective citation to legislative history, there are now two types of circuit splits on this topic. The first concerns whether Rule 803(3) can ever be used to admit hearsay state-of-mind testimony of future intent against a non-declarant. The First and Fourth Circuits have stated that it cannot, *Jenkins*, *supra*; *accord Gual Morales v. Hernandez Vega*, 579 F.2d 677, 680 n.2 (1st Cir. 1978), while the Second and Ninth Circuits have reached the opposite conclusion, *see Delvecchio*, *supra*; *United States v. Astorga-Torres*, 682 F.2d 1331, 1335-36 (9th Cir. 1982). The second type of circuit split occurs among those courts that fall into the latter camp—that is, those that allow such testimony under some circumstances. These courts are divided on the question of whether independent evidence connecting the declarant's statement with the non-declarant's conduct is a prerequisite to admitting such hearsay testimony in the first instance, with the Second Circuit holding that it is, *see Nersesian*, *supra*; *accord York*, *supra*, and the Ninth Circuit concluding that it is not, *see Astorga-Torres*, *supra*; *see generally United States v. Pheaster*,

544 F.2d 353, 374-80 (9th Cir. 1976), cert. denied sub nom. *Inciso v. United States*, 429 U.S. 1099, 97 S. Ct. 1118, 51 L. Ed. 2d 546 (1977)(applying *Hillmon* prior to enactment of Rule 803(3) to admit hearsay statement that declarant was going to meet "Angelo" to prove Angelo met the declarant). *See also Johnson v. Chrans*, 844 F.2d 482, 486 n.4 (7th Cir. 1988)(collecting cases and noting the "disagreement on the proper boundaries of the state-of-mind exception" embodied in Rule 803(3)); *Houlihan*, 871 F.Supp. at 1499-1500 (collecting cases).

In sum, the federal cases are in disarray on the question of whether, and under what circumstances, the 803(3) exception to the hearsay rule should be applied to admit hearsay evidence of the declarant's intent to prove the subsequent conduct of a third-party non-declarant.[3] This Court should grant review in the instant case and clear away the fog by setting a uniform federal standard on this important issue affecting a defendant's right to receive a fair trial.

C. The Second Circuit's Holding that Rule 803(3) Renders Statements of Intent by a Declarant Admissible to Prove Subsequent Actions of a Third Party is Contrary to the Intent of Congress

As noted, the House Judiciary Committee Report on Rule 803(3) and the Advisory Committee Note are in *apparent* conflict, and such appearance of conflict has led to conflicting rulings in lower federal courts.[4] Upon close analysis, however,

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[3] Here, "third party" indicates that the actor was neither the declarant nor the person to whom the out-of-court declaration was made.

[4] To review: the Judiciary Committee sought to "limit" application of Rule 803(3) out-of-court statements of intent to prove subsequent actions of the declarant only, while the Advisory Committee intended that the *Hillmon*

the two statements of legislative intent are actually in harmony. For one, the Advisory Committee never stated that its understanding of the *Hillmon* doctrine includes the principle that statements of intent are admissible against third parties. Indeed, to the contrary, the precise wording of the Note militates against such a construction. The Note states that the *Hillmon* rule, "allowing evidence of intention as tending to *prove the doing of the act intended* is, of course, left undisturbed" (emphasis added). Thus, the Advisory Committee referenced the specific aspect of the *Hillmon* doctrine pursuant to which a statement of intent may properly be used to prove "the doing of the act intended." Because the state-of-mind exception only encompasses utterances of the *declarant's* state of mind, and not statements by a declarant regarding someone else's state of mind, *see* Fed.R.Evid. 803(3), the "act intended" referenced in the Advisory Committee's Note can only mean the act intended *by the declarant*. Thus, if the evidence at issue tends to prove the doing of such act, it must of necessity be directed to the doing of the act *by the declarant*. Therefore, even if the Hillmon doctrine is left "undisturbed" to the extent it allows introduction of statements of intent to prove the doing of the act intended, such extent reaches no farther than using the declarant's statement of intent to prove *the declarant's* own subsequent conduct.

Additionally, a close reading of the *Hillmon* opinion reveals that the *Hillmon* doctrine, properly understood, does not include admission of statements of intent against third parties. *Hillmon* was a civil case in which a widow sued three insurance companies to collect on her dead husband's life insurance policies. She claimed that her husband died of a gunshot wound at a place called Crooked Creek after traveling there from Wichita. The insurance companies defended the suit by

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doctrine be left "undisturbed."

contending that the dead body at issue was not that of the plaintiff's husband, Mr. Hillmon, but instead belonged to one Walters. The companies sought to introduce two letters written by Walters—one to his sister, the other to his fiancé—stating his intent to travel from Wichita with Mr. Hillmon to "parts unknown."

The trial court excluded the two letters, but this Court reversed, holding that the letters were competent evidence that Walters acted in conformance with his previously-stated plans to travel from Wichita with Hillmon. 145 U.S. at 295-296. The *Hillmon* opinion does not, however, speak to the issue of whether the letters were admissible to prove the subsequent actions of any third party, including Mr. Hillmon. Indeed, the companies understandably did *not* seek to prove that Mr. Hillmon was at Crooked Creek on the night of the shooting; to do so would have bolstered the plaintiff's case.[5] Accordingly, the letters were not allowed into evidence to prove the subsequent actions of Mr. Hillmon or any other third party. They were only introduced to prove the subsequent actions of declarant Walters.[6]

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[5] Even if the insurance companies claimed that Mr. Hillmon killed Walters at Crooked Creek, then all parties agreed Mr. Hillmon was at Crooked Creek: the widow claimed he was killed there, and the insurance companies contended he killed Walters there. Hence, under no scenario did the insurance companies seek to *prove* Mr. Hillmon had traveled there.

[6] This Court did state, in dicta, that the letters made it more probable that Walters traveled in accordance with his intent to do so—and that he traveled with Mr. Hillmon—than if there had been no proof of such intention. 145 U.S. at 295-96, 12 S. Ct. at 912-913. The Court also quoted from *Hunter v. State*, 40 N.J.Law 495, 534, 536-538, a decision of the New Jersey Court of Errors and Appeals, in which that court approved admission into evidence of a letter stating an intent to travel with the defendant, to prove the defendant subsequently traveled with the declarant. As a result, some lower courts have concluded that this Court, in *Hillmon*, held that admission of out-of-court statements of intent can properly be used to prove subsequent actions of a non-declarant. *See, e.g., Houlihan*, 871 F.Supp. at 1498; *Brown*

Consequently, it does not matter whether the *Hillmon* doctrine is "left undisturbed" or "limited" in the manner intended by the Judiciary Committee. Either way, it only stands for the proposition that statements of intent are admissible to prove the subsequent conduct of the declarant—and only the declarant—in conformity with the stated intent. Therefore, Congress never expressed any intent that 803(3) be interpreted to allow admission of hearsay evidence of intent to prove the future actions of a third-party non-declarant.

This Court should grant review and reverse the decision of the Second Circuit, vacate the conviction and remand the case to the District Court with instructions to enter a judgment of acquittal, or in the alternative, grant Best a new trial.

D. The Second Circuit's Holding that Rule 803(3) Renders Statements of Intent by a Declarant Admissible to Prove Subsequent Actions of a Third Party is Theoretically Untenable

The state of mind exception codified in Fed.R.Evid. 803(3) provides that hearsay evidence is admissible if it bears upon the state of mind of the declarant. When this exception was developed at common law, it was originally only available where the declarant's state of mind was an issue in the case. The *Hillmon* doctrine is a theoretically awkward and questionable expansion of this exception, whereby evidence of

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v. Tard, 552 F.Supp. 1341, 1352 (D.N.J. 1982). Such is not the case, however, as the *Hillmon* court merely held that the letters at issue were competent evidence regarding the question in controversy, namely, whether *Walters*—the declarant—had traveled Crooked Creek. That Mr. Hillmon also went there was not something the insurance companies sought to prove.

the declarant's stated plans is used, not to prove his state of mind, but inferentially to prove his later performance of an act. *See United States v. Pheaster*, 544 F.2d 353, 376 (1976) (*Hillmon* creates an "extraordinary doctrine," "fundamentally different" from the norm, as "it does not require that the state of mind of the declarant be an actual issue").

Recognizing the awkwardness, this Court has expressed reluctance to apply *Hillmon* beyond the facts of that case. In *Shepard, supra*, this Court stated that the *Hillmon* doctrine marked the "high-water line beyond which courts have been unwilling to go." 290 U.S. at 105, 54 S. Ct. at 26. One might say that Justice Cardozo was attempting to build a dike to contain the *Hillmon* doctrine, and that courts must be particularly vigilant to ensure that the lake of admissible hearsay does not rise so high as to spill over that dike and flood the hearsay rule out of practical existence. Use of the *Hillmon* doctrine to admit hearsay against a third-party non-declarant constitutes a spilling over the dike, and indeed, such was the very result feared by the commentators as a logical extension of the *Hillmon* case. *See* Seligman, *An Exception to the Hearsay Rule*, 26 Harv. L. Rev. 146 (1912); Payne, *The* Hillmon *Case Revisited*, 41 Va. L. Rev. 1011, 1036 (1955).

The court in *United States v. Brown*, 160 U.S. App. D.C. 190, 490 F.2d 758 (1974), provided inferential support for the proposition urged by petitioner Best. The court in *Brown* dealt with the issue of whether a victim's statement of fear of the defendant can be admitted to prove the defendant's subsequent conduct. The court noted that the principal danger is that the jury will consider the victim's statement of fear as reflecting on the defendant's state of mind rather than the victim's. 490 F.2d at 766. *See People v. Purvis*, 56 Cal.2d 93, 13 Cal.Rptr. 801, 804, 362 P.2d 713, 716 (1961)("It may be that an inference as to the victim's conduct can be drawn from

the victim's state of mind, but certainly no permissible inference can be drawn therefrom as to the defendant's character or actions"). The *Brown* court's criticism of such rule might well (as the *Pheaster* court noted, 544 F.2d at 380 n.18) apply to the application of *Hillmon* as against third-party non-declarants:

> Such an approach violates the fundamental safeguards necessary to the use of such testimony [citation omitted]. Through a circuitous series of inferences, the court reverses the effect of the statement so as to reflect on the defendant's intent and actions rather than the state of mind of the declarant (victim).

490 F.2d at 771.

Instantly, the trial court went beyond the bounds of the already-infirm *Hillmon* doctrine, bringing its shaky legal foundation into sharp relief. *Hillmon* could have been used in this case to admit Gastle's hearsay to prove Macie's state of mind in making the utterance, or to prove that Macie made a call to Best.[7] This use would tend to prove that Macie acted

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[7] The Government might argue that, as with any planned meeting, for Macie to have carried out his plan would necessarily have involved Best's participation. Such is not the case presently, however. For one, the statement itself was somewhat ambiguous (e.g., Macie's stated intent to call "Jim" could have referred to another person besides Best). Also, even if Macie had placed a phone call to Best, there is no guarantee that Best would have participated. There may have been no answer, or the line may have been busy. Even if there were an answer, Macie may have left a message with Best's secretary or on Best's answering machine. Even if Best had answered and spoken with Macie, and even if they spoke about cost allocation memos, Macie's "taking care of it" (per his declared intent) could have entailed duping Best into unwittingly aiding Macie's scheme, without Best knowing anything fraudulent was taking place, thus precluding a "meeting" of the minds between Macie and Best. Hence, for Macie to have carried out his plan would not necessarily have involved Best in the fraud.

with criminal intent, and committed an act in furtherance of his plan. The use here, however, went well beyond those bounds. The exception was employed not to prove Macie's intent or actions, but rather to prove Best's conduct *and intent*. Specifically, the hearsay was admitted to prove that Best met with Macie (presumably by phone), and that during that meeting, Best heard about the fraud and formed a criminal intent to act as an aider and abettor in furtherance of Macie's plan. Therefore, the hearsay use permitted in the present case is of a different character than statements of intent to meet the defendant in person for some illegal purpose, where eyewitness testimony confirms that such meeting did in fact take place.

As the *Pheaster* court acknowledged, the *Hillmon* doctrine has come under sharp criticism from "very distinguished quarters, both judicial and academic." *Pheaster*, 544 F.2d at 380 n.18. The criticism is especially well taken where, as here, the extra-judicial utterance was ambiguous, the "corroborative" evidence was weak, and the prejudice to the defendant far outweighed any legitimate use of the declaration.

II.

THIS CASE PRESENTS AN IDEAL VEHICLE TO SET THE BOUNDARIES OF RULE 803(3)'S EXCEPTION TO THE HEARSAY RULE, AS THERE WAS SOME CORROBORATING EVIDENCE, BUT IT WAS OF SLIGHT PROBATIVE VALUE

In the present case, an extra-judicial statement by Macie that he would "call Albany and talk to Jim and take care of it with the Albany division" was used to prove that "Jim" (petitioner James Best) subsequently conspired with Macie over the phone to commit Medicare fraud. The district court found that the similarity of Macie's and Best's memos provided

the independent corroborating evidence required by Second Circuit precedent to allow the hearsay statement in against Best under Rule 803(3). *See* App. 34a.

This scenario is, to be sure, somewhat unusual in its features, in that there was no eyewitness testimony that such a phone call ever took place, nor did the Government introduce any telephone records, or question Macie on cross-examination whether he had made such a call. In the line of precedent upon which the Second Circuit relied, by contrast, the corroborating evidence consisted of eyewitness testimony that a meeting took place, and the contested hearsay statement was introduced to prove the nature of that meeting.

Ironically, it is the present case's distinctiveness, relative to the type of "independent corroborating evidence" involved, that provides this Court with an opportunity to set particularly helpful standards for lower courts regarding the circumstances under which statements of intent can properly be admitted to prove subsequent actions of third parties pursuant to Rule 803(3). The reason becomes clear when one considers the Court's possible dispositions. First, the Court could settle on a *per-se* prohibition, if it determines that Congress intended to limit the 803(3) exception to proof of subsequent actions of the declarant only. In that event, the Court would reverse the Second Circuit's decision so long as it found the error prejudicial.

Second, the Court could determine that the 803(3) exception is not so limited, but is instead broad enough to cover extra-judicial statements of intent to prove subsequent conduct of a non-declarant, but only when there is independent corroborative evidence which meets some objective standard of reliability. In that event, the Court might wish to provide the lower courts with guidance concerning what constitutes an

acceptable level of reliability. Here is where the advantage of granting review in the present case becomes apparent. In other cases—where there is eyewitness testimony or data records confirming that such a call or meeting took place—it would be difficult for this Court to set such standards apart from dicta, as such corroborating evidence would be at the "highly reliable" end of the spectrum. Hence, beyond holding that the corroborating evidence did meet the minimum threshold of reliability required for introduction of the hearsay testimony, this Court would likely leave to another day the question of whether some other form of (less reliable) corroborative evidence also met the minimum threshold.

In the present case, by contrast, the reliability of the evidence—*to wit*, the similarity of Best's and Macie's memos—falls somewhere in the middle of the spectrum, between "no independent corroborating evidence" and "highly reliable independent corroborating evidence." Accordingly, this Court could use the instant case to define precisely *where* between those two extremes the minimum threshold lies.

CONCLUSION

For the reasons expressed above, petitioner James Best respectfully asks this Court to grant the petition for a writ of certiorari to the Second Circuit.

Respectfully submitted,

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